No. 444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

FREDERICK STEEL CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MEMORANDUM

The opinions below, jurisdictional requisites, statutes involved and statement of facts are adequately set forth in the Petition. The question presented, as set forth in the Petition of the Commissioner, is inadequate and misleading. Respondent would suggest the question presented as follows:

QUESTION PRESENTED

The question presented is whether the taxpayer corporation may carry over and deduct its losses incurred prior to 1954 against income earned in 1954 and subsequent years from assets acquired in July, 1954, in a taxable transaction.

ARGUMENT

There are two compelling reasons why the Petition should be denied. First, as stated in the Petition, the issue presented "is inappropriate for review by this Court because of its unimportance for the future." (Pet. 4-5) This is correct because questions turning on the effective date of section 382, 1954 Code (in *Frederick* only section 382 (a) is involved) will not continue to arise.

Petitioner's claim that a "protective" petition for certiorari is appropriate because this Court might grant a taxpayer's petition for certiorari in another case in which the decision is alleged (erroneously) to be in direct conflict with the decision in this case, is sophistry. The truth of the matter, as reflected in the Petition, is that the revenue which could be so protected is minuscule. It is not a matter of *general* importance to the fisc whether *Ix* or the Petitioner receives or pays approximately $100,000.00.[1] Lacking *general* importance to the revenue, there could be no basis for this petition. The suggestion that if petitioner must pay *Ix*, petitioner should recover from *Frederick* and that such a result is important to the revenue and a basis for certiorari is equivalent to requesting certiorari so that petitioner may in this one instance take "from Peter to pay Paul".

Second, Petitioner is in error when he claims a conflict between the circuits is presented. The decision of the Sixth Circuit in the present case does not conflict (much less *directly*) with the decision of the Second Circuit in *Allied Central Stores, Inc.* v. *Commissioner*, 339 F. 2d 503 (1965), certiorari denied, 381 U.S. 903, or with the decision of the

[1] There is no merit to the suggestion (Pet. 5 and Note 3) that the undecided *Amherst Coal Co., et al.* v. *United States* cases, Civil Actions Nos. 2604-2606, pending in the S.D., W. Va., may, when decided, swell the amount of revenue involved. The *Amherst* cases involve the carryover of pre-merger losses to post-merger years with the merger occurring on December 31, 1952.

Third Circuit in *Frank Ix & Sons Virginia Corporation* v. *Commissioner*, 375 F. 2d 867 (1967), petition for certiorari pending, No. 334.

Several factors compel this conclusion. (1) *Allied* and *Ix* both involved tax-free (section 368 of the 1954 Code) reorganizations and the effect of the *Libson Shops* doctrine under such a circumstance. *Frederick* involves merely the purchase of assets in a taxable transaction. (2) *Allied* and *Ix* were both properly decided as 1939 Code cases and in each case the court expressly rested its decision on the ground that the reorganization took place prior to June 22, 1954, the general effective date of sections 381 and 382, 1954 Code, as applied to reorganizations. See *Allied*, *supra*, p. 504, and *Ix*, *supra*, p. 873.[2] The effective date of the 1954 Code, sections 381 and 382 as applied to reorganizations is dealt with in sections 393 (b), 394 (a) and 394 (c) of the 1954 Code. (3) The Sixth Circuit, in contrast, expressly found the relevant change in Respondent's business occurred after June 22, 1954 and, therefore, made the 1954 Code and specifically section 382 applicable. No disallowance of the loss carry-over resulted because of the absence of a change of ownership within the period prescribed in section 382. See Pet. 13A. The effective date of the 1954 Code provisions for taxpayers such as Frederick are found at sections 394 (b) and 395 (a) of the 1954 Code.

Respondent submits that no case involving net operating loss carry-overs after a reorganization (as that term is used in sections 381 and 382 (b)) could ever be in *direct* conflict with the present case which involves change of ownership and nature of the business as defined in section 382 (a). The *Allied Central*, *Ix* and *Amherst Coal* cases are all reorganization cases. In addition, the first two of those cases have been, and the last should be, decided on

[2] Whatever the decision may be in the *Amherst* cases, they are for the same reason 1939 Code cases.

the basis that they are governed by the 1939 Code, whereas the decision in *Frederick* is based on the 1954 Code. Thus, even the indirect conflict by analogy which might otherwise exist between *Frederick* and cases arising from reorganizations occurring after June 22, 1954 and, therefore, governed by the 1954 Code, is absent as support for the present petition.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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